SENATE AGRICULTURE
EXHIBIT NO. 3
DATE 3-10-11
BILL NO. HB 541

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Working to protect and restore Western Watersheds and Wildlife

Western Watersheds Project

July 12, 2010

Montana Department of Fish, Wildlife & Parks
Pat Flowers, Region 3 Supervisor
1400 S. 19th
Bozeman, MT 59718

Re: Domestic sheep and Bighorn Sheep conflicts, and WMA Commercial Use permits

Dear Mr. Flowers:

I am writing on behalf of the Western Watersheds Project (WWP) and the Gallatin Wildlife Association (GWA) regarding our continuing concerns over the prospect of domestic sheep trailing across the Robb Ledford WMA (RLWMA). As you should recall, we voiced significant environmental and legal concerns regarding this practice by letters dated June 6, 2009 (correspondence from GWA to Ken McDonald) and June 30, 2009 (correspondence from WWP, GWA, and Safari International to Region 3 Supervisor). It was our understanding at that time that, while there was little doubt that such uses require a Commercial Use Permit pursuant to the regulations adopted in 2006, you were going to (and did in fact) allow such trailing uses in 2009 without compliance with the law, due to timing concerns. We also understood, however, that this would be a one-time variance, and that you would then prepare an environmental assessment in support of a determination of whether or not to issue a permit for such uses in 2010 and beyond. We asked to be kept involved in this process, but here it is July of 2010, when livestock producers annually trail their sheep across the RLWMA, and to our knowledge there has been no EA, and no permit issued. While we gave you the benefit of the doubt last year, and decided to await the MEPA process rather than resort to legal action, we will not hesitate to bring legal proceedings this time around to end this practice. The purpose of this letter is to place the Department on notice that once again allowing trailing of thousands of domestic sheep across the RLWMA for a purely commercial purpose, and to the detriment of wildlife, is unacceptable and a breach of your public trust duties. In reviewing the comments below, please refer to the letters referenced above for the appropriate context.

We continue to be concerned about the survival and recovery of native, wild Bighorn Sheep in Montana, whether occurring naturally or reintroduced into areas the Bighorns historically occupied and from which they were eradicated. In fact, our concerns have been greatly magnified by the significant die-off of Bighorns in Montana and across the West in the past year. It is incumbent upon FWP to protect the Bighorn Sheep herds as a public trust resource, and to manage FWP lands consistent with that duty. Incompatible commercial and private uses of public lands must not be tolerated.

Trailing Sheep is an Incompatible Commercial Use of a WMA

There can be no doubt that domestic sheep trailing is a commercial use as defined in ARM 12.14.101(3), since the benefit inures solely to the domestic, for-profit producers. FWP has itself acknowledged that trailing must be considered and analyzed as a commercial use. (FWP Notice of Decision for CU EA).[1] However, a commercial use permit may only be issued for sheep trailing on the RLWMA if it contributes to "the overall mission, goals, and objectives" of the WMA, and serves the public interest in enjoying the wildlife and other natural resources of the WMA (12.14.150; CU Plan, 1.1).

> ***"The purpose and function of WMAs are to conserve and manage wildlife habitat for the benefit of wildlife species and for the enjoyment of the general public. . . WMAs are gems scattered across the landscape, highly prized, used, and protected by the people of the state."***

(CU Plan EA, Section 3 Affected Environment).[2]

To date, domestic sheep trailing across the RLWMA has resulted in the deaths of at least 16 Bighorns Sheep, and the transplanting of at least 18 others, from a herd that by definition under the recently approved BHS Conservation Strategy *is not a viable herd.* It goes without saying that this does nothing to "enhance the public's knowledge of and appreciation for the wildlife" in the area, and does not contribute to the overall mission and goals of the site. Instead, the sheep trailing poses a continuing threat to native bighorn sheep viability in the area of the RLWMA. Domestic sheep also present grave threats to bighorn sheep due to the transmission of *Pasteurella spp.*, a lethal disease to Bighorns that can be transmitted from a single nose-to-nose

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[1] "The Gallatin Wildlife Association and Montana River Action are concerned about sheep trailing across the Robb/Ledford WMA. REPLY: This is a valid concern that requires a resolution." Notice of Decision, page 2, EA Comments & Responses.

[2] The Management Goal for the Robb-Ledford WMA, as stated on the website, is to: "Maximize the productivity of the soil, vegetation, and watershed and the game and nongame wildlife that are products of that environment. A secondary goal will be to provide public access to these and adjacent public properties (BLM, DNRC and USFS) for sport hunting and other recreational pursuits. Management emphasis is to attain stated Management Objectives (below) which includes maximizing soil/vegetation interrelationships that will result in a productive environment for all wildlife species. Secondary management emphasis will be to meet Region Three objectives for big game species, upland game bird and nongame species management plans. Livestock grazing will be used as a tool to help achieve wildlife and vegetative objectives."

contact. It is suspected, if not likely, that this type of interaction is a substantial, if not sole, cause of the recent die-off of Bighorns across Montana and the West, which represents a significant changed circumstance from the time when you entered into the Greenhorns MOU with Rebish & Helle and Rebish & Konen) in 2001. Of course, the Commercial Use Permitting Regulation represents a significant change in the law since that MOU was executed.

As the CU Regulation was adopted after sufficient public notice and opportunity to participate, as it did not include any grandfather clause, and as it was promulgated to promote and protect the public health and welfare in furtherance of your public trust duties, it is clear as a matter of law that the 2001 MOU is no longer enforceable as against FWP, and should be disavowed in the clearest terms possible.

The 2001 Greenhorns MOU is Unenforceable as a Matter of Law

For purposes of analyzing the effect of the CU Regulation on the Greenhorns MOU, you should be aware that the principles or rules of statutory construction apply equally to administrative rules and regulations. *Glendive Medical Center, Inc. v. Montana Department of Public Health and Human Services*, 2002 MT 131, 310 Mont. 156, 49 P.3d 560 (2002).

The first legal issue, of course, has to do with the effect of statutes or regulations on a contract that was legal when entered into, but authorizes future actions which then become prohibited by the new law. Of course, the new law cannot retroactively make the subject of such a contract illegal, but to the extent that the contract remains to be executed, the question becomes what effect the new law has on those previously un-regulated activities. It is understandable that the livestock producers in the Greenhorns MOU may feel that their rights under the "contract" are not subject to new law promulgated by FWP, who they contracted with. However, such an assertion of rights to avoid the CU permit requirements would be mistaken.

As the U.S. Supreme Court has made clear, **"legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations..."** *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976). In point of fact, "contracts, however express, cannot fetter" the exercise of a legislative body's jurisdiction: "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a ***congenital infirmity***. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 307-08, 55 S.Ct. 407, 416 (1935) (emphasis added). This is because it is presumed that the parties realize when entering into a contract over a matter which is subject to legislative authority that at some point in the future that authority may well be exercised in a manner that impairs the value of the contract, or render it unenforceable. *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 31 S.Ct. 265 (1911) (a contract that was valid when entered into for the giving of free passes by an interstate carrier in consideration of a release of a claim for damages rendered unenforceable when Congress passed a law prohibiting charges of anything greater than fair value of passage). That is even more true in this case, where the private parties were contracting with representatives of the agencies themselves.

While in certain limited circumstances exercises of legislative authority will not be deemed to invalidate pre-existing, inconsistent contracts that were legal when entered into, such is not the case when that authority is exercised to protect the public health and welfare generally. See, e.g., *Peniche v.* Aeromexico, 580 S.W.2d 152 (Tex.Civ.App. Houston 1st Div. 1979); *Phoenix Physical Therapy v. Unemployment Ins. Div., Contributions Bureau*, 284 MT 95, 943 P.2d 523 (1997). Obviously, the CU permitting rules are in furtherance of FWP's public trust duties, and are intended to secure important benefits for the public generally. It is axiomatic that a contract that cannot be performed without violating applicable law is void as a matter of public policy, even if it was a valid agreement at the time it was entered into. *Am.Jur.2d*, Contracts, § 229. The only remaining question, then, becomes what difference it might make that the same agency that executed the MOU subsequently adopted a broad regulatory scheme that is inconsistent with "commitments" made in the earlier MOU.

There is no such thing as an implicit grandfather clause in statutory or regulatory construction. It is the general rule of construction that where the legislative authority itself makes no exception to the positive terms of a statute or regulation, then the presumption is that it intended to make none. *Am.Jur.2d* Statutes, § 213. No rule of public policy is available to create exceptions to a rule where none exists in the rule itself, not even the policies of equity, justice, or hardship. *Id.* The fact of the matter is that the private livestock producers here had every opportunity to participate in the subsequent rulemaking, and to ask for such a grandfather clause, but apparently chose to rest on their presumed rights. From FWP's side, it must also be presumed that the Commissioners were aware of established practices and legal relations applicable to the subject matter of the CU permit rule. *Id.*, at § 96. In any case, if this ends up in the courts, any judge would be compelled to accord a liberal construction to the CU permit regulation, as it represents a new rule intended for the advancement of the public welfare. *Id.*, at § 186. Such new laws are to receive the construction from the courts that will give effect to their object, suppress the mischief they are addressed toward, and "defeat all evasions for the continuance of the mischief," *Id.*, in this case commercial uses of WMAs that undermine the primary purposes of WMAs.

For any and all of these reasons, it should be quite clear to you that the Greenhorns MOU is at least unenforceable as against FWP, if not actually void as a matter of law. The point about private parties not "fettering" any future exercise of lawful jurisdiction and authority is particularly apt here. At the time the MOU was entered into, FWP could have been excused for not fully appreciating the lethal threat posed by domestic sheep to Bighorns. For example, the health assessment in this regard relied upon by FWP in adopting its Bighorn Sheep Conservation Strategy earlier this year was the 2007 Western Association of Fish and Wildlife Agencies report that concluded, based upon an exhaustive literature review, that "there is a preponderance of evidence that indicates significant risk exists for disease transmission from domestic sheep and goats to wild sheep" and recommending "that wild sheep managers take appropriate steps to minimize, mitigate, or eliminate the opportunities for disease transmission through commingling of wild sheep with domestic sheep and goats." BHS Cons. Strat., at 43-44.

To the extent that FWP representatives appear to have limited the FWP's discretion to act in the public interest in the Greenhorns MOU, they acted beyond the scope of their lawful authority. In fact, by all appearance many of the agencies signing onto that MOU may have exceeded their authority to the extent it appears they were binding the hands of their agencies to act in the public interest in the future, based on new information and changed circumstances. In any case, the fact that the commercial users had every opportunity to participate in the rulemaking process, and that FWP did not see fit to exempt existing commercial uses from the CU rule, is controlling. The livestock producers, like any other commercial interest, are obligated by law to seek a permit for trailing sheep across the RLWMA, and it is quite apparent from the rule itself that such application would be futile, as this would constitute a commercial use that is prejudicial to wildlife. The idea that a commercial use for a WMA would result in killing Bighorns sheep from a herd that is not close to viable population levels (according to the Conservation Strategy) at a time when we are experiencing such severe and widespread die-offs of Bighorns sheep is morally repugnant.

In conclusion, it would be illegal and a violation of your public trust duties to continue to allow this non-conforming commercial use on the RLWMA, as you have in recent years. Please advise the producers to find other means to move their livestock, such as trucking them as they have previously done, and make it clear to them that they must apply for a commercial use permit if they still desire to continue this use. However, from our perspective, it is quite clear that it would be arbitrary and capricious for FWP to issue such a permit, as this particular use of the RLWMA is in now way beneficial to wildlife, and is entirely inconsistent with the purposes of the RLMWA.

Please advise us of how you intend to proceed in this matter, and keep us fully apprised of any further developments until such time as the matter is resolved.

Sincerely,

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cc:

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Bob Ream, Commissioner
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